

## The Speech-ing of Sexual Harassment

Frederick Schauer<sup>1</sup>

Although a great deal of sexual harassment takes place without words, even more of it does not. Whether it be the words that are used to make the kind of “quid pro quo” proposition that characterizes the classic if-you-sleep-with-me-you-will-not-get fired form of sexual harassment, or the catcalls and other words of taunting that create the archetypal hostile environment, a vast amount of what uncontroversially counts as sexual harassment under the law takes place through the use of what would be called “speech” in the ordinary, non-technical, non-legal, non-First-Amendment sense of that word.

For the first fifteen years of the development of the law of sexual harassment, the presence of speech in the harassing act, with only a very few exceptions, no more implicated the First Amendment’s free speech clause than does the presence of speech in virtually every act of

---

<sup>1</sup>Frank Stanton Professor of the First Amendment and Academic Dean, John F. Kennedy School of Government, Harvard University. This Essay was first presented at the Symposium on Sexual Harassment held at the Yale Law School on February 27-March 1, 1998. I first talked about the themes in this article in my First Amendment class at the Harvard Law School in the Spring of 1997. One of the students in that class, Laura A. Rosenbury, followed up on this class discussion with a paper from which I have benefitted greatly in writing this Essay. I have also been assisted by discussions with Dick Fallon, who still disagrees with what I say.

unlawful price-fixing, unlawful gambling, or unlawful securities fraud. In the past decade, however, it has become increasingly common, especially in popular and media discussion, to bring the First Amendment to bear whenever a claimed act of sexual harassment makes use of words or pictures. We now see First Amendment rhetoric marshaled to defend the very same harassing behavior that before the decade would not with any seriousness have generated First Amendment responses. In the past decade, but not before, sexually harassing speech that previously was not even close to being considered speech in the First Amendment sense is now taken by many people, both in and out of the courts, to implicate the First Amendment in new and previously unimagined ways.

In seeking to explain the shift by which sexually harassing speech has relatively recently become First Amendment speech, we could hypothesize that this shift represents nothing other than a natural doctrinal development, one in which the previous doctrinal error of considering sexually harassing speech to be outside the coverage of the First Amendment has finally been corrected. Under this view, the law works itself pure, and it is no surprise to see the current state of affairs moving in the right First Amendment direction. And under this view, the previous state of affairs can be explained only by naivete, ignorance, or the presence of pernicious forces of political correctness that keep the First Amendment away from its proper place, that place being in restricting the scope of sexual harassment law when the sexual harassment, whether *quid pro quo* or hostile environment, takes place with the use of words - "speech" not only in the ordinary language, but in the First Amendment sense as well.

The view that First Amendment scrutiny of the universe of verbal sexual harassment is the proper understanding of the task of the First Amendment, however, presupposes that there are moderately workable and well-known doctrinal or theoretical standards to determine the scope of the First Amendment's coverage. It turns out, however, that this is not the case. Although it is now obvious that the overwhelming proportion of verbal or linguistic behavior has nothing

whatsoever to do with the First Amendment,<sup>1</sup> the boundary between the speech that implicates the First Amendment and the speech that does not is as much a matter of history, sociology, culture, and politics as it is a matter of formal constitutional doctrine or philosophical free speech theory. Once we see that neither First Amendment doctrine nor abstract free speech theory can explain why an injunction against the sale of legally obscene materials is treated as a prior restraint<sup>2</sup> but that the licensing of speech that is central to the Securities Act of 1933 is not,<sup>3</sup> or why the published instructions on how to commit a contract killing are thought by some to raise First Amendment concerns<sup>4</sup> but that the published instructions on how to (mis)use a chain saw are not,<sup>5</sup> it becomes clear that we cannot ignore the role of politics, culture, economics, and numerous other social forces in determining which forms of word-based conduct inspire First Amendment rhetoric and standards and which forms of word-based conduct do not.

---

<sup>1</sup>See Frederick Schauer, Categories and the First Amendment: A Play in Three Acts, 31 Vanderbilt Law Review 265 (1982); Frederick Schauer, Codifying the First Amendment: New York v. Ferber, 1982 Supreme Court Review 285; Frederick Schauer, Speech and “Speech” – Obscenity and “Obscenity”: An Exercise in the Interpretation of Constitutional Language, 67 Georgetown Law Journal 899 (1979). See also Catharine MacKinnon, *Only Words* (Cambridge, Massachusetts: Harvard University Press, 1993).

<sup>2</sup>Vance v. Universal Amusement Co., 445 U.S. 308 (1980).

<sup>3</sup>Pursuant to §5 of the Securities Act of 1933, an issuer may not use any written materials, including advertisements and other factual statements, in connection with the sale of a security unless and until those materials have been evaluated by the Securities and Exchange Commission, a government agency, and the Commission has determined that the content of the materials are complete and neither false nor misleading. In any other context, such a mechanism for official scrutiny of speech before permission to publish it is granted would be considered an archetypal prior restraint. Yet in the securities context, this form of regulation is not measured against First Amendment standards. *Dun & Bradstreet, Inc., v. Greenmoss Builders, Inc.*, 472 U.S. 749, 762 n.5 (1985). For rare and thus far unavailing attempts to subject the basic registration provisions of the securities laws to First Amendment scrutiny, see Aleta Estreicher, Securities Regulation and the First Amendment, 24 Georgia Law Review 223 (1990); Nicholas Wolfson, The First Amendment and the SEC, 20 Connecticut Law Review 265 (1988).

<sup>4</sup>Rice v. Paladin Enterprises, Inc., 128 F.3d 233 (1997).

<sup>5</sup>See Frederick Schauer, Mrs. Palsgraf and the First Amendment, 47 Washington and Lee Law Review 161 (1990).

The seeming transformation of sexual harassment from a topic about workplace abuse of power into a topic about the First Amendment provides an ideal case study for this perspective, and tracing and analyzing this shift is my primary goal in this Essay. For once we see that the applicability (or not) of the First Amendment is not primarily a product of formal legal doctrine, we are in a position better to understand the social forces that patrol and thus control the boundaries of the First Amendment.

### I. The Architecture of the First Amendment

Like any legal rule, the First Amendment has both a scope of application and a prescription for what is to happen within that scope. Just as the prescriptions of the Securities Act of 1933 pertain only to certain sales of certain securities and not to all transactions of all kinds, and just as the regulations of the Occupational Safety and Health Administration apply to some businesses and not to others, so too do the prescriptions of the First Amendment apply only to a limited domain of behavior and not to the universe of human action.

This much is obvious, and so too is the fact that the domain of application of the First Amendment - its coverage<sup>6</sup> - is not coextensive with the forms of behavior that would count as “speech” in ordinary non-technical English. Not only does the First Amendment cover activities that are not speech - dancing, mime, music, oil paintings, parades, protest armbands, flag waving, flag burning, and so on - but it also, and more importantly, does not cover numerous activities that are speech. To start with the most obvious examples, the speech that is necessary to make a contract, to provide a warranty, to leave one’s property to one’s heirs, or to consummate virtually

---

<sup>6</sup>On the distinction between coverage, the initial question whether heightened scrutiny is applicable, and protection, the subsequent question whether the heightened scrutiny has been satisfied, see Frederick Schauer, *Free Speech: A Philosophical Enquiry* (Cambridge: Cambridge University Press, 1982); Frederick Schauer, Can Rights Be Abused?, 31 *Philosophical Review* 225 (1981).

any other sort of legal transaction does not by virtue of its speech-ness fall within the constitutional constraints of the First Amendment. To suppose that one might evade the commitments of a contract because one's words of acceptance of an offer are immune by virtue of the First Amendment from legal liability is simply laughable, and it is no surprise that not a single reported case has even had to consider the possibility.

Now one response to this is to say that in all of these examples the words are performative,<sup>7</sup> producing legal consequences by virtue of their utterance - like saying "I do" at one's wedding, or a judge saying "I sentence you to ten years imprisonment" - and thus quite separate from what the First Amendment is all about. But to accept even the exclusion of performative utterances from the scope of the First Amendment is to accept the basic point that the First Amendment does not cover all uses of words, even though the amendment itself contains no distinction between performative and other utterances. Moreover, the domain of speech that lies outside the coverage of the First Amendment is hardly limited to the performative. Numerous non-performative propositions are similarly outside of the First Amendment's range, as with the descriptions on product labels, the representations sellers make about the securities they are selling, or the accurate information one competitor might give to another about plans for a price increase. Indeed, even the prescriptions that in First Amendment jargon might be called advocacy are more often than not untouched by First Amendment concerns. The First Amendment might be implicated when Clarence Brandenburg gives a speech urging his followers to commit acts of "revengeance" against Jews and African-Americans (not the labels that Brandenburg used),<sup>8</sup> but it is not when the leader of an organized crime syndicate urges his followers to commit acts of revengeance against members of a rival syndicate.<sup>9</sup> Indeed,

---

<sup>7</sup>See J.L. Austin, *How to Do Things With Words* (J.O. Urmson and Marina Sbisa, eds., Oxford: Clarendon Press, 1962); J.L. Austin, "Performative Utterances," in *Philosophical Papers* (Oxford: Oxford University Press, 3d ed. 1979), pp. 233-52.

<sup>8</sup>*Brandenburg v. Ohio*, 395 U.S. 444 (1969) (per curiam).

<sup>9</sup>Clearly the best effort to struggle with these issues of the boundaries of the First

the First Amendment hardly covers the full universe of political advocacy. When for undeniable political or ideological reasons Tom Metzger urged his followers in the White Aryan Resistance to commit acts of racial violence,<sup>10</sup> or when people were urged to blow up the World Trade Towers in New York,<sup>11</sup> the judicial response was not that these instances of advocacy satisfied the Brandenburg v. Ohio understanding of the clear and present danger test, but rather that neither Brandenburg nor any of the rest of the First Amendment apparatus was even applicable.

---

Amendment's coverage is R. Kent Greenawalt, Speech, Crime, and the Uses of Language (New York: Oxford University Press, 1989). An earlier version is R. Kent Greenawalt, Speech and Crime, 1980 American Bar Foundation Research Journal 645.

<sup>10</sup>Berhanu v. Metzger, 119 Or. App. 175, 850 P.2d 373 (Ct. App. 1993). For a description of the underlying facts as presented in the Multnomah County Circuit Court (Portland, Oregon) in 1990, see National Law Journal, November 5, 1990; September 26, 1994.

<sup>11</sup>See United States v. Salameh, 152 F.3d 88 (2d Cir. 1998).

This last statement lies at the core of the matter. It is one thing to say that the First Amendment applies but that its high standards are satisfied. That explains what happens when a public figure or public figure makes out a case of actual malice satisfying the very high standards of New York Times Co. v. Sullivan,<sup>12</sup> and that is what happens when, even more rarely, an incitement to unlawful action carries such explicitness and such a danger of imminent danger that it satisfied the even higher standards of Brandenburg. By contrast, in all of the instances I have noted, the First Amendment's applicability has been explicitly or implicitly rejected., and consequently the regulability of the verbal act is not even measured against First Amendment standards. For a vast range of verbal, linguistic, or pictorial conduct, the First Amendment is simply not part of the picture. Indeed, although it is common for critics of some proposed constraint on linguistic acts to complain about the impermissibility of making an exception to the First Amendment, in truth the First Amendment is itself an exception, even if a vital one, to the principle that linguistic behavior - speech in the ordinary language sense - is subject to control on the same standards as is any other behavior.<sup>13</sup> A cardinal principle of First Amendment architecture, therefore, is that the initial inquiry into whether the First Amendment and its rules, standards, tests, factors, theories, maxims, metaphors, and considerations even apply is an inquiry that is quite different from, and not dependent on, the question whether the conduct at issue is something that the person in the street would think of as an instance of "speech."

---

<sup>12</sup>376 U.S. 254 (1964).

<sup>13</sup>See Frederick Schauer, and Richard Pildes, Electoral Exceptionalism and the First Amendment, 77 Texas Law Review 1803 (1999).

Although it should be self-evident that looking for the presence of words, pictures, and symbols will not help much in delineating the boundaries of the First Amendment, it is far from clear what will. As a first step, we can say that the coverage of the First Amendment is delineated by the First Amendment's purposes, but the numerous different posited purposes - assisting the search for truth, encouraging dissent, checking abuses of power, facilitating democratic deliberation, permitting individual self-expression, and so on<sup>14</sup> - remain sufficiently contested that attempts to explain the coverage of the First Amendment have produced something far short of a consensus. This is not to say that things could not be different, or that the existence of dissensus is strong evidence of the fact that there just is no purpose. Rather, the existing dissensus is evidence only of the proposition that lies at the center of this paper - that there is no existing First Amendment doctrinally-embodied principle that provides much, if any, assistance in determining which cases are First Amendment cases and which are not. And in the absence of such an accepted doctrinal principle, the determination of the coverage or non-coverage of various forms of behavior has been a function not of doctrine but of a complex interplay of historical, political, cultural, and economic forces. As the examples above illustrate, the pervasive anomalies of First Amendment coverage strongly suggest that the determination of why some prior restraints implicate the First Amendment and others do not, why some advocacy of illegal action triggers the Brandenburg test and other advocacy does not, and why some speech-caused harm may generate a civil cause of action but other speech-caused harm does not has been, even if need not inevitably be, a largely sociological rather than doctrinal matter. While determining the boundaries of the First Amendment may not be solely a matter of politics, nor is it anywhere near solely a matter of logic or legal principle.

---

<sup>14</sup>For a survey and critical analysis of the traditional free speech justifications, see Frederick Schauer, *Free Speech: A Philosophical Enquiry* (Cambridge: Cambridge University Press, 1982).

## II. Sexual Harassment as Uncovered Verbal Behavior

Against the background of recognizing the enormous universe of uncovered speech, it should come as no surprise that the presence of words has not been sufficient to embolden anyone to claim that the words that are part of a standard quid pro quo act of sexual harassment are covered by the First Amendment. Although an employer who promises a promotion in exchange for sex or a professor who offers higher grades in exchange for sex are using speech in the literal sense to make those offers, we have yet to see a claim that this speech is of the variety that the First Amendment might plausibly cover. Fearing either a Rule 11 sanction for making a legally unsupportable claim, or fearing nothing more than judicial disbelief, those whose words have been taken to constitute unlawful acts of quid pro quo sexual harassment have yet to have the nerve to claim that those words are also covered by the First Amendment.

With respect to hostile environment sexual harassment, the history began in the same way. When the EEOC first promulgated its hostile environment regulations in 1980, and when the Supreme Court first endorsed the concept of hostile environment sexual harassment in 1986 in Meritor Savings Bank v. Vinson,<sup>15</sup> there was no suggestion that the First Amendment was even relevant despite the fact that the overwhelming proportion of hostile environment cases are ones in which words or pictures are a significant part of the circumstances that create a hostile environment. Although there are many instances in which the hostile environment is created solely by pinching, groping, fondling, and various other types of unwanted touching, a survey of the kinds of events that generate hostile environment claims demonstrates that in most of them the hostile environment is created by an environment of insults, jokes, catcalls, comments, and other forms of undeniably verbal conduct. And although this verbal conduct is speech in the ordinary language sense, throughout the 1980s it appears generally to have been understood that the First Amendment was irrelevant to the issue, and that a First Amendment defense on the part of a harasser or his employer would not be taken seriously. That no one dared suggest during

---

<sup>15</sup>477 U.S. 59 (1986).

the hearings surrounding the nomination and Senate confirmation of Justice Thomas that his alleged behavior was nothing more than an exercise of his First Amendment rights is indicative of the fact that throughout the 1980s sexual harassment and freedom of speech were treated like psoriasis and the Fifth Amendment, each of independent importance but not in any apparent way related to each other. As in Meritor itself, the usual situation was that the First Amendment was not mentioned at all, even though some of the conduct was verbal.<sup>16</sup> On the rare occasions when a First Amendment defense was actually suggested in a hostile environment case, it was quickly and summarily dismissed.<sup>17</sup>

### III. The Speech-ing of Sexual Harassment

---

<sup>16</sup>See also *Price, Waterhouse v. Hopkins*, 490 U.S. 228 (1988). And in the lower courts, examples include *Tunis v. Corning Glass Works*, 747 F. Supp. 951, 955, 959 (W.D.N.Y. 1988); *Snall v. Suffolk County*, 611 F. Supp. 521, 531-32 (E.D.N.Y. 1985).

<sup>17</sup>See for example, *Jordan v. Wilson*, 662 F. Supp. 528 (M.D. Ala. 19887); *Jew v. University of Iowa*, 749 F. Supp. 946 (S.D. Iowa, 1990); *EEOC v. Sage Realty Co.*, 507 F. Supp. 599, 610 (1981); *Gilbert v. Board of Police and Fire Commissioners of Madison*, 128 Wis. 2d 558, 384 N.W.2d 366 (Ct. App. 1986).

Fourteen years after Meritor, the situation looks quite different. Hostile environment claims are now routinely met with First Amendment defenses, and indeed the entire concept of hostile environment sexual harassment is equally routinely challenged as an infringement of the First Amendment rights of the managers and employees whose verbal and pictorial conduct has created the hostile environment.<sup>18</sup> Time and again, hostile environment complaints premised on what is said to and about women in the workplace are met with the response that what is said to and about women in the workplace is an expression of a political or ideological point of view, and is consequently part of the freedom of speech that it is the task of the First Amendment and the larger concept of freedom of speech<sup>19</sup> to protect.

---

<sup>18</sup>[Cite to Jeffrey Rosen article in New Republic].

<sup>19</sup>Because the First Amendment in the doctrinal sense requires state action, its scope is not unlimited. But in many instances in which the First Amendment might not apply as a doctrinal matter, it is common in the United States to use the words “First Amendment” to signal what the user of the words believes to be a restriction on freedom of speech even when the restriction might not be judicially actionable.

If one were looking for the flash point for the shift from thinking that free speech and even verbal sexual harassment had nothing to do with each other to thinking that sexual harassment law jeopardizes the First Amendment, it would not be wrong to start with Robinson v. Jacksonville Shipyards, Inc.,<sup>20</sup> where the hostile environment in which Lois Robinson worked as a welder consisted in part of “[p]ictures of nude and partially nude women appear[ing] throughout the [workplace] in the form of magazines, plaques on the wall, [and] photographs torn from magazines,”<sup>21</sup> where the defendant explicitly raised First Amendment defenses, where the court took those defenses seriously enough to discuss them at some length in its opinion,<sup>22</sup> and where the American Civil Liberties Union, after an acrimonious debate within its Florida chapter, filed a First Amendment inspired amicus curiae brief against Robinson’s claim and in support of the employer.<sup>23</sup> Moreover, it is clear that Robinson was the case that was the centerpiece of a number of law review articles appearing shortly thereafter, all of which took the First Amendment arguments in Robinson more seriously than the judge in Robinson did, and all of which argued that hostile environment claims in general, and not just the hostile environment claims in Robinson, were a direct attack on the First Amendment.<sup>24</sup>

---

<sup>20</sup>760 F. Supp. 1486 (M.D. Fla. 1991).

<sup>21</sup>760 F. Supp. At 1493.

<sup>22</sup>760 F. Supp. At 1536-39.

<sup>23</sup>On Robinson as the watershed case in prompting the First Amendment defenses in hostile environment cases, see Judith Resnik, Changing the Topic, 8 Cardozo Studies in Law and Literature 339 (1996).

<sup>24</sup>See especially Kingsley R. Browne, Title VII as Censorship: Hostile-Environment Harassment and the First Amendment, 52 Ohio State Law Journal 481 (1991). See also Wayne Lindsey Robbins, Jr., When Two Liberal Values Collide in An Era of “Political Correctness”: First Amendment Protection as a Check on Speech-Based Title VII Hostile Environment Claims, 47 Baylor Law Review 789 (1995); Eugene Volokh, How Harassment Law Restricts Free Speech, 47 Rutgers Law Review 563 (1995); Eugene Volokh, Freedom of Speech and Workplace Harassment, 39 UCLA Law Review 1791 (1992). At least one prominent federal judge wondered why recognizing the First Amendment implications of hostile environment actions took as long as it did. United States v. X-Citement Video, Inc., 982 F.2d 1285, 1296 n.7 (9<sup>th</sup> Cir. 1992) (Kozinski, J., dissenting). For an earlier but ignored suggestion about the relevance of the First Amendment in a range of hostile environment cases, see John B. Attanasio,

But identifying Robinson as a turning point is only the beginning of the story. Robinson was undeniably important, but it is also important to understand why Robinson became the case that inspired the ACLU, the case that inspired the judge to take the First Amendment defenses seriously even if in the final analysis he did not accept them, and the case that inspired a raft of commentators.

---

Equal Justice Under Chaos: The Developing Law of Sexual Harassment, 51 University of Cincinnati Law Review 1, 21-23 (1982).

In answering this question, we are assisted in looking at some of the cases that preceded Robinson. And if we look at these, we see the first suggestions of First Amendment issues in hostile environment cases in which part of what created the hostile environment was the use of an item that would otherwise have been thought of, in other contexts, as carrying the “aura” of the First Amendment. Whether it be the prisoner who claimed that his taunting of a prison employer with a sexually explicit poem was protected by the First Amendment because the instrument of taunting was a poem,<sup>25</sup> or a range of cases in which pictures and magazines were at the center of the harassing scenario,<sup>26</sup> it is far from unreasonable to suppose that the impetus for First Amendment interest was an item that would itself have been thought to trigger First Amendment thinking.

If this is right, then it explains the salience of Robinson. Robinson not only involved the presence of words and pictures as the creators of the hostile environment in which Lois Robinson was compelled to work, but a number of those pictures were centerfold nudes from Playboy and other similar magazines. And if there is anything that prompts a reflexive reaction that the First Amendment is involved, it is Playboy. It is hyperbole to suggest that the First Amendment would be raised as a defense if the driver of a delivery truck delivering copies of Playboy negligently caused an accident, or if a rolled-up copy of Playboy was used to commit a battery - but not much.

---

<sup>25</sup>Gomes v. Fair, 738 F.2d 517 (1984).

<sup>26</sup>Andrews v. City of Philadelphia, 895 F.2d 1469, 1482, 1485 (3d Cir. 1990); Rabidue v. Osceola Refining Co., 584 F. Supp. 419, 433 (E.D. Mich.1984), affirmed, 805 F.2d 611 (6<sup>th</sup> Cir. 1986); ; Arnold v. City of Seminole, 614 F. Supp. 853, 858 (E.D. Okla. 1985).

We see the same phenomenon in a different version in a number of other hostile environment cases. Because schools, colleges, and universities have traditionally been thought to be special First Amendment venues, and because First Amendment-inspired claims of academic freedom are often used as a defense when otherwise unexceptionable legal remedies are applied against schools, colleges, and universities,<sup>27</sup> it should come as no surprise to discover that when otherwise routine hostile environment claims arise or are suggested in the context of educational institutions that First Amendment defenses that would not in different contexts be taken seriously are treated as having greater credibility.<sup>28</sup> Thus, when faculty or students engage in verbal conduct that in different workplace settings would not suggest First Amendment arguments, they have done just that when the setting is a school, college, or university.<sup>29</sup> As with a First Amendment “item” such as Playboy triggering otherwise distant First Amendment argument and rhetoric in what appears to be non-First Amendment contexts, so too does a First Amendment setting such as a school, college, or university appear to trigger otherwise distant First Amendment argument and rhetoric in what would otherwise appear to be a non-First Amendment scenario.

---

<sup>27</sup>See, for example, *University of Pennsylvania v. Equal Employment Opportunity Commission*, 493 U.S. 182 (1990).

<sup>28</sup>See generally Mary Gray, Academic Freedom and Nondiscrimination: Enemies or Allies?, 66 *Texas Law Review* 1591, 1594 (1988).

<sup>29</sup>See *Korf v. Ball State University*, 726 F.2d 1222 (7<sup>th</sup> Cir. 1984); *Doe v. University of Michigan*, 721 F. Supp. 852 (E.D. Mich. 1989); *Fraser v. Bethel School District No. 403*, 755 F.2d 1356, 1370 (9<sup>th</sup> Cir. 1985).

My point, however, is not that the First Amendment is raised when some features of a setting appear, on the basis of historical associations, to make the First Amendment relevant. This is true, and of some interest, but not nearly as important as the subsequent emanations of the association. For once First Amendment items and First Amendment settings have suggested that there is a relationship between hostile environment sexual harassment law and the First Amendment, that suggestion, and that relationship, persists even in circumstances in which there is neither a First Amendment item nor a First Amendment context. In ways that were not apparent prior to Robinson and prior to other cases in which First Amendment items and First Amendment settings planted the idea that hostile environment sexual harassment was a First Amendment topic, after Robinson we saw First Amendment defenses raised, and taken seriously, even when neither familiar First Amendment items nor familiar First Amendment settings were present.<sup>30</sup> The important historical point however, is that First Amendment associations, arising in contexts in which some familiar First Amendment feature was present, then spilled over into contexts in which no familiar feature was present, producing the consequence that situations that would have produced no First Amendment interest a decade or more ago are now seen, for virtually the first time, as raising First Amendment issues and justifying First Amendment defenses.

---

<sup>30</sup>See, for example, *DeAngelis v. El Paso Municipal Police Officers Association*, 51 F.3d 591 (5<sup>th</sup> Cir. 1995); *Black v. City of Auburn*, 857 F. Supp. 1540, 1549 (M.D. Ala. 1994); *Jenson v. Eveleth Taconite Co.*, 824 F. Supp. 847, 884 n.89 (D. Minn. 1993).

None of this is to deny Judith Resnik's point that shifting the terrain of argument from the topic of harassment to the topic of the First Amendment serves strategic and political purposes for those who are uncomfortable with the substance of sexual harassment law and who recognize that First Amendment rhetoric has a special political cachet in the United States, a cachet that allows free speech claims to trump equality claims when the two are, or are perceived to, conflict.<sup>31</sup> Nevertheless, changing the topic is only likely to appear plausible when there is a familiar First Amendment hook available initially, although, as I have tried to show, combining the desire to change the topic with the existence of a First Amendment hook will often produce a change of topic that is effective even after and when the hook is absent.

#### IV. Harris v. Forklift and the Power of Silence

---

<sup>31</sup>Resnik, Changing the Topic, *op. cit.* On the sociological primacy of free speech claims over equality claims in much of American legal and political culture, see Catharine MacKinnon, *Feminism Unmodified* (Cambridge, Massachusetts: Harvard University Press, 1987); Frederick Schauer, The Ontology of Censorship, in Robert Post, ed., *Censorship and Silencing: Practices of Cultural Regulation* (Santa Monica, California: Getty Institute, 1998), pp. 147-68 ; Charles R. Lawrence III, If He Hollers Let Him Go: Regulating Racist Speech on Campus, 1990 *Duke Law Journal* 431; Mari J. Matsuda, Public Response to Racist Speech: Considering the Victim's Story, 87 *Michigan Law Review* 2320 (1989).

Now that the First Amendment rabbit is out of the box in hostile environment cases, however, it is quite hard to put it back. Even though the application of the First Amendment to standard hostile environment settings involving gender-based slurs, intimidating catcalls, omnipresent sexual jokes, suggestive comments, and aggressive and targeted posting of sexually explicit pictures appears to have no more relationship to the central concerns of the First Amendment than does verbal gambling, price-fixing, offering of securities, or making a contract, the association between the words of the hostile environment and the First Amendment has taken hold, even more in the public discourse than in the courts. And once it has taken hold, it is hard to remove it, even though, again, none of the plausible accounts of the purposes of the First Amendment appear pertinent.<sup>32</sup>

Once we understand the doctrinal politics of the speechification of sexual harassment, we can understand how difficult it would be to reverse that process. Nevertheless, the Supreme Court's decision in Harris v. Forklift System, Inc.<sup>33</sup> may well have stemmed the tide, even in unexpected

---

<sup>32</sup>This is not to deny that offensive workplace slurs, for example, embody a political, cultural, and ideological point of view. But so does a quid pro quo overture, so does a pinch, so does a grope, and so does any other form of unwanted touching in the workplace. And once we understand that the distinction between the coverage and the non-coverage of the First Amendment does not and cannot turn on the distinction between what conduct is and what conduct is not speech in the ordinary language sense of that word, then the fact that repeatedly calling a co-worker or employee a "bitch" embodies a worldview no more makes this otherwise uncovered speech act a First Amendment issue than does the fact that groping that same co-worker or employee embodies the same worldview.

<sup>33</sup>510 U.S. 17 (1993).

ways. In this respect the important thing about Harris is in what the Supreme Court did not say, and thus in what the Supreme Court said by saying nothing.

In Harris, as in most other hostile environment cases,<sup>34</sup> the bulk of the offending conduct was verbal, and thus linguistic, and thus speech. And given the phenomenon I have described above, and the proximity between the decision in Robinson and the briefing and argument in Harris, it should not be a surprise that the defendants raised the First Amendment as a defense in their brief,<sup>35</sup> and the plaintiff responded in her brief to the First Amendment defense.<sup>36</sup> Despite clearly knowing that the First Amendment was on the table, however, none of the Justices raised the First Amendment issue in oral argument. Much more importantly, however, the Court said not a word about the First Amendment in its opinion upholding Harris's claims. The First Amendment may have been relevant to the defendant, but it was plainly not relevant to the Supreme Court, the prevalence of speech in the harassing behavior notwithstanding.

---

<sup>34</sup>For another example, see Franklin v. Gwinnett County Public Schools, 503 U.S. 60 (1992).

<sup>35</sup>Brief for Respondent, at 31-33 (Harris v. Forklift Ststems, Inc., No. 92-1168).

<sup>36</sup>Reply Brief for Petitioner, at 10-11.

Although some might argue that the Supreme Court could have made a stronger statement, or offered better analysis, by dealing with the First Amendment claim in the opinion,<sup>37</sup> there is another, and arguably better, view. As we know from many of our ordinary dealings, to be ignored is often more insulting than to be argued with. To be “blown off,” to use the contemporary vernacular, is frequently far more dismissive, and far more hurtful, than to be engaged, even if the engaging party is engaging for the purpose of disagreeing. And if this is so in everyday life, it may be true in legal argument as well. As a consequence, one way of understanding the Supreme Court’s opinion in Harris, and of understanding its failure even to mention the First Amendment arguments that were made, is as the Court’s attempt to signal a dismissive attitude toward First Amendment arguments in cases in which the connection with the First Amendment underlying concerns are as tenuous as they were in Harris. In an important respect, the Supreme Court “blew off” the defendant’s First Amendment arguments, and it did so by saying, in as strong way as it could, that the defendant’s First Amendment arguments were so trivial that they did not even deserve a mention in the United States Reports. The Court, arguably, meant to insult the defendant’s First Amendment arguments, and by ignoring those arguments the Court delivered the insult in the strongest way imaginable.<sup>38</sup>

It is perhaps too early to know whether the insult will have its intended effect. But although public commentary continues to associate the First Amendment with the application of hostile environment sexual harassment law, and although some commentators maintain that recognizing hostile environments constitutes a threat to the First Amendment,<sup>39</sup> it is noteworthy and important that what appeared to be some momentum in the courts towards First Amendment annexation of hostile environment sexual harassment law, and perhaps eventually other aspects

---

<sup>37</sup>Richard H. Fallon, Jr., Sexual Harassment, Content Neutrality, and the First Amendment Dog That Didn’t Bark, 1994 Supreme Court Review 1.

<sup>38</sup>In case the message was too subtle to be understood, there was also the Court’s statement a year earlier that its decision in R.A.V. v. City of St. Paul, 505 U.S. 377 (1992), was not to be taken to restrict the application of sexual harassment law. 505 U.S. at 389-90.

<sup>39</sup>See Rosen, op. cit.

of sexual harassment law involving words as well, appears to have abated. And that is as it should be.